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In Search of a Broader Stream of Commerce Theory: The Eighth Circuit Streams Past Inconsistencies in Favor of Equitable Results

*Clune v. Alimak AB*¹

I. INTRODUCTION

Since its inception, “the stream of commerce” theory of personal jurisdiction has created confusion and conflict among courts as to the number and type of contacts a nonresident manufacturer must have with a forum state before that manufacturer can be subject to personal jurisdiction in that forum. The point of contention among the federal courts has been on the issue whether a manufacturer can be amenable to suit in a state, absent a direct marketing presence, by the mere fact that it places its product into the stream of commerce. Indeed the Supreme Court has offered little in the way of guidance on the issue, producing only a plurality opinion on the very question in the case of *Asahi Metal Industry Co. v. Superior Court of California*.²

In the wake of *Asahi*, the United States Court of Appeals for the Eighth Circuit has waived on the issue.³ In its earlier opinions, the court adopted Justice O’Connor’s approach to the stream of commerce theory, holding that the act of inserting a product into the stream of commerce, without more, is an insufficient basis for personal jurisdiction.⁴ The court, however, continually has moved away from the stance it took in those earlier opinions toward the broader stream of commerce theory that Justice Brennan advocated.⁵ Following its most recent opinion on the issue, *Clune v. Alimak AB*,⁶ the court has all but rejected its earlier stance, producing inconsistent, albeit equitable, results.

This Note discusses the evolution of the stream of commerce theory. First, it discusses the origin of the theory and the early split amongst state courts. Next, it discusses the modern Supreme Court jurisprudence on the issue, including the plurality decision in *Asahi*. Finally, this Note discusses the evolution of the theory in the Eighth Circuit and argues that, while the case law is inconsistent, the results are equitable.

1. 233 F.3d 538 (8th Cir. 2000), *cert. denied*, 121 S. Ct. 2551 (2001).

2. 480 U.S. 102 (1987).

3. *See infra* notes 108-53 and accompanying text.

4. *See infra* notes 108-27 and accompanying text.

5. *See infra* notes 127-53 and accompanying text.

6. 233 F.3d 538 (8th Cir. 2000), *cert. denied*, 121 S. Ct. 2551 (2001).

II. FACTS AND HOLDING

This action arose after Joseph Clune fell to his death from an unenclosed area on top of a construction hoist while working at a construction site in Kansas City, Missouri.⁷ Clune's wife and children subsequently filed a wrongful death suit in the United States District Court for the Western District of Missouri⁸ against the manufacturer of the construction hoist, Linden-Alimak AB/Alimak AB⁹ ("Alimak AB"). The district court dismissed the case for lack of personal jurisdiction.¹⁰

Alimak AB was a Swedish corporation that designed and manufactured construction hoists exclusively for the United States market.¹¹ In 1972, Alimak AB sold the hoist in question F.O.B.¹² Swedish port to Alimak, Inc.¹³ Alimak, Inc., was Alimak AB's exclusive distributor in the United States, maintaining an office in Oregon.¹⁴ The distributor imported the hoist via Seattle, Washington, and the hoist subsequently ended up in the possession of J.E. Dunn, Clune's Missouri employer.¹⁵

7. *See id.* at 540. A construction hoist is a temporary elevator-like structure used by workers during the construction of buildings. *Id.* at 540 n.1.

8. *See id.* at 538, 540.

9. Linden-Alimak AB/Alimak AB was the name of the corporation as it existed in 1972, the time relevant to this lawsuit. *Id.* at 540. Since the initiation of the suit, the corporation has undergone several name and identity changes. *See id.* at 540 n.3. For the sake of clarity, this Note, like the court, will refer to the corporation as it existed in 1972.

10. *See id.* at 540.

11. *See id.* at 540, 543.

12. The term F.O.B. stands for "free on board," a "mercantile term denoting the seller is responsible for delivering goods on board a ship or other conveyance for carriage to the consignee at a specified location." BLACK'S LAW DICTIONARY 676 (7th ed. 1999). In the instant case, Alimak AB had "the risk of loss" only until it delivered the product to the Swedish port, whereby all risk shifted to the buyer, Alimak, Inc. *See Clune*, 233 F.3d at 541.

13. *Id.* at 540. Alimak, Inc., also has undergone many identity and name changes. *Id.* at 540-41. For the sake of clarity, this Note will refer to the distributor as Alimak, Inc.

14. *See id.* at 540, 541. Even though Alimak, Inc., was the exclusive distributor of Alimak AB and had a similar name, the court noted that the two companies were "distinct." *Id.* at 541 n.4. Alimak, Inc., "paid employees through its own payroll, provided its own policies, rules and regulations, and paid for its Swedish parent's products when it purchased F.O.B. Swedish port." *Id.* Therefore, for the purposes of the court's jurisdictional analysis, it treated the two companies as separate entities. *See generally id.* at 540-46.

15. *See id.* at 538, 541. No admissible evidence was present in the record as to

Aside from selling its products to a United States distributor, Alimak AB had a few other contacts with the United States. The Swedish company provided sales brochures and instruction manuals to Alimak, Inc., for use in promoting and servicing its products.¹⁶ Alimak AB also conducted training seminars in the United States for technicians employed by its distributor.¹⁷ Additionally, Alimak AB's logo appeared on its product, and some of its members served as directors of Alimak, Inc.¹⁸

Alimak AB had a limited connection with Missouri. The company's strongest connection with the forum was the fact that twenty to forty of the seven hundred hoists that the company sold in the United States ended up in Missouri.¹⁹ Aside from this connection, however, nothing in the record indicated that Alimak AB maintained an office, agent, employee, property, or conducted any advertising or solicitation in Missouri.²⁰

On the issue of personal jurisdiction, the Clunes argued before the United States District Court for the Western District of Missouri that, by designing its product for the United States market, Alimak AB intended to benefit from every state where its distributor marketed.²¹ Therefore, the Clunes argued, the company had established sufficient minimum contacts with Missouri to maintain an action in the state.²² Alimak AB, on the other hand, argued that designing a product for the *general* United States market, without more, was not enough to establish sufficient minimum contacts with Missouri to allow for jurisdiction in the state.²³

The district court agreed with Alimak AB. It held that the company could not be subject to personal jurisdiction because it "did not send its product 'into a *regional* distributor with the expectation that the distributor [would] penetrate a discrete, multi-State trade area.'"²⁴ Accordingly, the district court dismissed the case.²⁵

who or what entities owned and operated the hoist between Alimak, Inc.'s importation of the product and the time of Clune's accident. See Appellant's Brief at 3, *Clune* (No. 00-1009).

16. See *Clune*, 233 F.3d. at 544.

17. See *id.* at 543.

18. See *id.* at 543, 544.

19. See *id.* at 543-44.

20. See *generally id.* at 543-44.

21. See Appellant's Brief at 28-32, *Clune* (No. 00-1009).

22. *Id.*

23. See Appellee's Brief at 48-51, *Clune* (No. 00-1009).

24. *Clune*, 233 F.3d at 544 (emphasis added) (quoting *Vandelune v. 4B Elevator Components Unlimited*, 148 F.3d 943, 948 (8th Cir.), *cert. denied sub nom. Synatel Instrumentation Ltd. v. Vandelune*, 525 U.S. 1018 (1998)).

25. *Id.* at 540.

On appeal, the Eighth Circuit reversed.²⁶ The court rejected the district court's distinction between those foreign manufacturers that sell to distributors that market regionally and those that sell to distributors that market nationally.²⁷ The court stated that "[t]he difference is one of form, not function, and the practical effect is the same."²⁸ It held that "a foreign manufacturer that successfully employs one or two distributors to cover the United States intends to reap the benefit of sales in every state where those distributors market."²⁹ Therefore, the court held that Alimak AB "purposefully directed its products to the United States through the distribution system it set up in this country," and, thus, had sufficient minimum contacts with Missouri to be subject to suit in the forum.³⁰

In a concurring opinion, Judge Bright disagreed with the majority's holding, stating that it was overly broad.³¹ He stated that the majority's "application of the stream of commerce theory would subject a foreign entity to suit in any state of the Union where the product ended up, regardless of the original destination for the article or how the particular product happened to be in a particular place in any state."³² Not wishing to adopt such a broad stream of commerce theory, he rejected the majority's conclusion.³³

26. *See id.*

27. *See id.* at 544.

28. *Id.*

29. *Id.*

30. *Id.* at 544-45. Having established the minimum contacts, the Eighth Circuit went on to the second part of the jurisdictional analysis, the fairness analysis. The court weighed Alimak AB's contacts with the state against:

the burden on [Alimak AB] of defending itself in Missouri, the interest of Missouri in adjudicating the dispute, the Clune's interest in obtaining the most efficient resolution of [the] matter, the judicial system's interest in obtaining the most efficient resolution of [the] matter, and the shared interest of the several states in furthering fundamental substantive social policies.

Id. at 545. The details of the court's holding on this issue are not central to this Note. It is sufficient to say that the court found personal jurisdiction in Missouri proper under these circumstances. *See generally id.* at 545-46.

31. *See id.* at 546 (Bright, J., concurring). Judge Bright, however, did find personal jurisdiction proper in this case. He based this conclusion not on the majority's stream of commerce theory but on a line of cases holding that parent corporations exercising enough control over their subsidiaries are not separate entities from those subsidiaries for purposes of personal jurisdiction. *See id.* (Bright, J., concurring). The majority rejected this conclusion, holding that Alimak AB and Alimak, Inc., were "distinct" companies. *See supra* note 14.

32. *Clune*, 233 F.3d at 546 (Bright, J., concurring).

33. *See id.* (Bright, J., concurring).

III. LEGAL BACKGROUND

A. *Personal Jurisdiction and Due Process*

The Due Process Clause of the Fourteenth Amendment³⁴ “limits the power of a state court to render a valid personal judgment against a nonresident defendant.”³⁵ It requires that, absent consent or presence in the forum, a nonresident defendant “have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”³⁶ This test for jurisdictional contacts is not “mechanical or quantitative,” but, rather, depends “upon the quality and nature of [a defendant’s] activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.”³⁷

When analyzing the constitutionality of personal jurisdiction, the Supreme Court and the lower courts follow a two-step process, whereby they examine: (1) the sufficiency of the defendant’s contacts with the state; and (2) the reasonableness and fairness of subjecting the defendant to personal jurisdiction under the circumstances.³⁸ A court first must determine if a defendant has sufficient minimum contacts with the forum to satisfy due process.³⁹ To establish such contacts, “it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws.”⁴⁰ While the contacts must be such that a defendant reasonably should anticipate that his or her acts would have consequences in the state, foreseeability alone is not a “sufficient benchmark for personal jurisdiction under

34. The Fourteenth Amendment, in pertinent part, states that no “State [shall] deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1.

35. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980).

36. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

37. *Id.* at 319.

38. *See Clune*, 233 F.3d at 545 (holding that “[w]ith minimum contacts satisfied, we must next balance those contacts” against factors of fairness and reasonableness); *see also Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 374 (8th Cir. 1990) (holding that “in addition to determining whether a defendant has purposefully established minimum contacts with the forum state, courts must also examine” factors of fairness and reasonableness). *See generally Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102 (1987).

39. *See supra* note 38 and accompanying text.

40. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

the Due Process Clause.”⁴¹ Furthermore, the contacts must be those of the defendant, and the “unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.”⁴²

Once a court finds that a defendant has sufficient minimum contacts, the court next determines whether it would be fair and reasonable under the circumstances to subject the defendant to personal jurisdiction in the forum.⁴³ The Supreme Court has held that courts must determine such fairness and reasonableness by evaluating five factors.⁴⁴ These factors are: (1) the burden on the defendant; (2) the interests of the forum state; (3) the plaintiff’s interest in obtaining relief; (4) the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and (5) the shared interests of the several states in furthering fundamental substantive social policies.⁴⁵ If, after weighing these factors, a court determines that jurisdiction is fair and reasonable, the court constitutionally may subject a defendant to personal jurisdiction in the forum.⁴⁶

B. Stream of Commerce Theory: Its Origin and Early Developments

Courts created the stream of commerce theory of personal jurisdiction to address difficult cases where products or services of an out-of-state enterprise cause injury in the forum state.⁴⁷ Yet, since its inception, the theory has produced conflicting opinions among courts.⁴⁸ The point of contention has been whether the mere fact that a nonresident corporation’s product reaches a forum through the chain of distribution is a contact sufficient to subject that corporation to personal jurisdiction in the forum.

Among the pioneers in answering this question was the Illinois Supreme Court in *Gray v. American Radiator & Standard Sanitary Corp.*⁴⁹ The plaintiff in that case sued an Ohio component parts manufacturer for producing a defective safety valve that caused a water heater to explode and injure the

41. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980). For a more detailed treatment of the foreseeability element of personal jurisdiction, see *infra* notes 47-60 and accompanying text.

42. *Hanson*, 357 U.S. at 253.

43. See *supra* note 38 and accompanying text.

44. See *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 113 (1987).

45. See *id.*

46. See *id.*

47. See WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS § 36(g), at 104 (2d ed. 1993).

48. See *infra* notes 49-60 and accompanying text.

49. 176 N.E.2d 761 (Ill. 1961).

plaintiff.⁵⁰ The defendant's only contact with Illinois stemmed from a safety valve it sold to a Pennsylvania manufacturer, which then incorporated the valve into one of its water heaters, "which in the course of commerce was sold to an Illinois consumer."⁵¹ The court found this limited contact was sufficient to subject the defendant to jurisdiction in Illinois.⁵² It held that the fact that a manufacturer only indirectly benefits from a forum's laws:

does not make [the forum] any less essential to the conduct of his business; and it is not unreasonable, where a cause of action arises from alleged defects in his product, to say that the use of such products in the ordinary course of commerce is sufficient contact with this State to justify a requirement that he defend here.⁵³

Not all states adopted this liberal approach to the stream of commerce theory of personal jurisdiction. In *Hodge v. Sands Manufacturing Co.*,⁵⁴ the Supreme Court of Appeals of West Virginia held that foreign corporations did not satisfy the minimum contacts requirement by the mere fact that their products were sold in the forum.⁵⁵ The case involved facts almost identical to those in *Gray*, where the plaintiff sued an out-of-state water heater manufacturer and an out-of-state component parts manufacturer for a product defect.⁵⁶ As in *Gray*, none of the defendants in *Hodge* sold their products directly to the plaintiff, and the only contact the defendants had with the forum was that their products ended up in the plaintiff's possession through the course of commerce.⁵⁷ In recognizing the similarities between this case and *Gray*, the court held that "though this Court has given due consideration to [the *Gray*] decision[], it is not disposed to accord [it] convincing force or effect in its decision of the case at bar."⁵⁸ Accordingly, the court did not subject either defendant to personal jurisdiction.⁵⁹

50. See *id.* at 762.

51. *Id.* at 764.

52. See *id.* at 766.

53. *Id.* For early cases that held similarly to *Gray* on nearly identical facts, see generally *Hearne v. Dow-Badische Chemical Co.*, 224 F. Supp. 90 (S.D. Tex. 1963); *Hutchinson v. Boyd & Sons Press Sales, Inc.*, 188 F. Supp. 876 (D. Minn. 1960).

54. 150 S.E.2d 793 (W. Va. 1966).

55. See *id.* at 802.

56. See *id.*

57. See *id.* The manufacturer of the water heater sold the heater to an "independent dealer" in West Virginia, who subsequently sold the product to the plaintiff. *Id.*

58. *Id.*

59. See *id.*; see also *Keckler v. Brookwood Country Club*, 248 F. Supp. 645 (N.D. Ill. 1965) (holding that the mere fact that a product ends up in a state through the stream of commerce does not establish the minimum contacts necessary to satisfy due process).

From its inception, the stream of commerce theory has produced conflicting results as to the number and type of contacts a foreign corporation must have with a forum state before it can be constitutionally amenable to suit in the forum. As the above cases indicate, whether a foreign manufacturer could be subject to personal jurisdiction in a forum depended largely on where the fortuitous event of injury occurred.⁶⁰ During this early period, the states had little Supreme Court guidance on the issue, and it would not be until twenty years after the *Gray* decision that the Court would address the stream of commerce theory squarely and attempt to define its parameters.

C. World-Wide Volkswagen Corp. v. Woodson:
Mere Foreseeability is Not Enough

The Supreme Court first considered the stream of commerce theory of personal jurisdiction in *World-Wide Volkswagen Corp. v. Woodson*.⁶¹ In *World-Wide Volkswagen*, the plaintiff sued, among other defendants, an automobile distributor and retailer in an Oklahoma court for defective design.⁶² The plaintiff bought a car in New York, and, while passing through Oklahoma, suffered severe injuries in a fire resulting from a rear-end collision.⁶³

Both the distributor and the retailer were New York corporations with their principle places of business in New York.⁶⁴ The corporations did not conduct business in Oklahoma, had no agent in the state, and did not advertise in or solicit business from the state.⁶⁵ Furthermore, no evidence existed that either defendant ever had sold a car that entered Oklahoma prior to selling the automobile to the plaintiffs.⁶⁶

The Oklahoma Supreme Court held that jurisdiction was proper.⁶⁷ The court held that an automobile is “by its very design and purpose so mobile that petitioners can foresee its possible use in Oklahoma.”⁶⁸ The court further held that “under the facts we believe it reasonable to infer, given the retail value of the automobile, that the petitioners derive substantial income from automobiles

60. See *supra* notes 47-59 and accompanying text.

61. 444 U.S. 286 (1980).

62. See *id.* at 288.

63. See *id.*

64. See *id.* at 288-89.

65. See *id.* at 289.

66. See *id.*

67. See *id.* at 289-91.

68. *Id.* at 290.

which from time to time are used in the State of Oklahoma.”⁶⁹ For these reasons, the court allowed jurisdiction in the forum.⁷⁰

In a six-to-three decision, the Supreme Court reversed.⁷¹ While the Court acknowledged that, because of modern conveniences, limits on personal jurisdiction “have been substantially relaxed over the years,”⁷² the Court held that, “[n]evertheless, we have never [held] . . . that state lines are irrelevant for jurisdictional purposes.”⁷³ The Court further held that the defendants had not purposefully availed themselves of the Oklahoma forum, stating:

[W]e find . . . a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction. Petitioners carry on no activity whatsoever in Oklahoma. They close no sales and perform no services there. They avail themselves of none of the privileges and benefits of Oklahoma law. They solicit no business there either through salespersons or through advertising reasonably calculated to reach the State. Nor [do] . . . they indirectly, through others, serve or seek to serve the Oklahoma market. In short, respondents seek to base jurisdiction on one, isolated occurrence and whatever inferences can be drawn therefrom: the fortuitous circumstance that a single . . . automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma.⁷⁴

In reversing the state court decision, the Court refuted the idea that jurisdiction was proper because it was foreseeable that the car could cause injury in Oklahoma. The Court held that “‘foreseeability’ alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause.”⁷⁵ To hold otherwise, the Court continued, in effect, would make a chattel its

69. *Id.*

70. *See id.* at 289-91.

71. *See id.* at 291, 299 (Brennan, J., dissenting), 313 (Marshall, J., dissenting), 317 (Blackmun, J., dissenting).

72. *Id.* at 292.

73. *Id.* at 293.

74. *Id.* at 295. The Court did acknowledge that the defendants may not have obtained any revenue for the automobile but for the fact that it was capable of use in distant states like Oklahoma. *See id.* at 298. The Court, however, held that “whatever marginal revenues petitioners may receive by virtue of the fact that their products are capable of use in Oklahoma is far too attenuated a contact to justify that State’s exercise of *in personam* jurisdiction over them.” *Id.* at 299.

75. *Id.* at 295.

seller's agent for service of process, causing the seller's "amenability to suit [to] travel with the chattel."⁷⁶

The Court, however, held that "foreseeability is not wholly irrelevant."⁷⁷ Notwithstanding:

the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.⁷⁸

The Court reasoned that requiring more of a connection "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."⁷⁹

While the Court did not provide specific examples, it did give some indication as to what amount of contact with a state sufficiently would ensure the degree of predictability needed to subject a defendant to suit in the forum under the stream of commerce theory. In dicta, the Court stated that if the sale of a product "is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its products in other States, it is not unreasonable to subject it to suit in one of those States."⁸⁰ The Court further stated that "the forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."⁸¹

The *World-Wide Volkswagen* Court, thus, established a limit on *in personam* jurisdiction under the stream of commerce theory—that the mere awareness that a product could end up in a state by the unilateral activity of a consumer is not, in and of itself, sufficient to support jurisdiction. Nevertheless, the Court did not issue any clear rules on the number of affiliating contacts necessary to subject a nonresident manufacturer to personal jurisdiction. Seven years later, however, a sharply divided Court would attempt to define these parameters more clearly.

76. *Id.* at 296.

77. *Id.* at 297.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 297-98.

*D. Asahi Metal Industry Co. v. Superior Court of California:
The Court Splits Along a Familiar Line*

In *Asahi*,⁸² the Court finally addressed an issue that had divided lower courts for more than twenty years: whether the mere awareness by a manufacturer that its products indirectly will reach a forum state through the chain of distribution is a sufficient contact with the forum to subject that manufacturer to personal jurisdiction.⁸³ The plaintiff, a Japanese tire manufacturer, brought an indemnity action in a California court against Asahi, another Japanese manufacturer, for selling defective tire valve assemblies.⁸⁴ The plaintiff had incorporated the valve assemblies into its tires, and one of those tires subsequently became the subject of a California products liability suit.⁸⁵ The plaintiff sought indemnification from Asahi after it had settled the products liability suit out of court.⁸⁶

Asahi had limited contacts with California. While Asahi's products did reach California through the chain of distribution, the defendant derived only around one percent of its income from the plaintiff tire manufacturer.⁸⁷ Asahi had "no offices, property, or agents in California."⁸⁸ "Nor did the defendant solicit any business or make any direct sales in California. Moreover, Asahi did not design or control the system of distribution that carried its valve assemblies into California."⁸⁹

All Justices, with the exception of Justice Scalia, held in this case that personal jurisdiction was unconstitutional.⁹⁰ The majority held that, under the circumstances, it was not fair or reasonable to hail the foreign manufacturer into a California court.⁹¹ Although the Court agreed almost unanimously that

82. 480 U.S. 102 (1987).

83. *See id.* at 105.

84. *See id.* at 106.

85. *See id.* The tire manufacturer had sold the tire to a motorcycle manufacturer that subsequently incorporated the tire into one of its motorcycles that it sold in California. *Id.* The Californian who purchased the motorcycle suffered serious injuries after the tire in question blew out. *Id.*

86. *See id.*

87. *See id.* The plaintiff, in turn, made about twenty percent of its sales in the United States to the State of California. *See id.*

88. *See id.* at 108.

89. *Id.*

90. *See id.* at 116-22.

91. *See id.* Applying the fairness and reasonable test, the Court found: (1) the burden on the defendant was severe because the defendant was from a foreign country; (2) the interest of the plaintiff in obtaining efficient relief was slight because the plaintiff was also from a foreign country; (3) California's interest in hearing the dispute was

personal jurisdiction was not fair under the circumstances, the Court split sharply on the issue whether Asahi had established sufficient minimum contacts with California.⁹²

Four Justices, led by Justice O'Connor, held that Asahi did not have sufficient minimum contacts with the forum to establish personal jurisdiction.⁹³ O'Connor first reiterated the dicta in *World-Wide Volkswagen* that the "forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."⁹⁴ O'Connor, however, held that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State."⁹⁵ O'Connor further held that there must be some "additional conduct" by a defendant, such as: "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State."⁹⁶ But "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State."⁹⁷

A four-Justice concurrence, led by Justice Brennan, disagreed with O'Connor, holding that a manufacturer that places its product in the stream of commerce has sufficient minimum contacts with all states in the chain of distribution.⁹⁸ Refuting O'Connor's contention that there must be some "additional conduct," Brennan held that "[t]he stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale."⁹⁹ As long "as a participant in this process is aware that the final product is being marketed in the

slight, as this was an indemnity action between two foreign corporations; and (4) neither the interstate judicial system nor the states had a significant interest in considering the procedural and substantive policies of foreign nations. *See id.* at 114-15.

92. *See id.* at 116, 121.

93. *See id.* at 108-13. Joining Justice O'Connor were Chief Justice Rehnquist, and Justices Powell and Scalia. *See id.* at 105.

94. *Id.* at 109.

95. *Id.* at 112.

96. *Id.*

97. *Id.*

98. *See id.* at 117 (Brennan, J., concurring). Joining Justice Brennan were Justices White, Marshall, and Blackmun. *See id.* at 116 (Brennan, J., concurring).

99. *Id.* at 117 (Brennan, J., concurring).

forum State, the possibility of a lawsuit there cannot come as a surprise.”¹⁰⁰ Brennan concluded that defendants who derive an economic benefit from the forum indirectly benefit from the state’s laws, regardless of whether there is additional conduct directed toward the state.¹⁰¹

Justice Stevens also disagreed with the test that O’Connor articulated.¹⁰² He criticized O’Connor’s conclusion that a distinct line exists between “mere awareness” and “purposeful availment.”¹⁰³ Stevens, however, did not adopt Brennan’s conclusion that the mere placement of a product within the stream of commerce is enough of a contact to support jurisdiction in a forum.¹⁰⁴ Instead, Stevens argued that the minimum contacts test “requires a constitutional determination that is affected by the volume, the value, and the hazardous character of the components.”¹⁰⁵

In *Asahi*, the Court failed to provide a majority opinion as far as a clear test as to what constitutes sufficient minimum contacts for the stream of commerce theory. Given the traditional split among the lower courts on the issue, it is not surprising that the Court could not reach an agreement.¹⁰⁶ However, as a practical matter, *Asahi* did anything but resolve the issue, and subsequent decisions in the lower courts have continued to split.¹⁰⁷

100. *Id.* (Brennan, J., concurring).

101. *Id.* (Brennan, J., concurring).

102. *See id.* at 121-22 (Stevens, J., concurring). Justice Stevens’s concurrence was joined by Justices White and Blackmun. One may guess how the two joining Justices can at once accept and reject Justice Brennan’s approach.

103. *See id.* at 122 (Stevens, J., concurring).

104. *See id.* at 121-22 (Stevens, J., concurring).

105. *Id.* at 122 (Stevens, J., concurring). Justice Stevens did not determine whether *Asahi* had sufficient contacts with California, as he argued that the Court’s unanimous determination that personal jurisdiction was unfair under the circumstances—rendering the minimum contacts analysis unnecessary. *See id.* at 121-22 (Stevens, J., concurring). Stevens, however, did opine that “[i]n most circumstances I would be inclined to conclude that a regular course of dealing that results in deliveries of over 100,000 units annually over a period of several years would constitute ‘purposeful availment.’” *Id.* at 122 (Stevens, J., concurring).

106. For a comparison of the conflicting state approaches to the stream of commerce theory adopted early on by the lower courts, see *supra* notes 47-60 and accompanying text.

107. Subsequent cases have categorized the law in one of three ways. Some have adopted Justice O’Connor’s approach in the *Asahi* decision. *See Terracom v. Valley Nat’l Bank*, 49 F.3d 555, 561-62 (9th Cir. 1995) (holding that O’Connor’s approach in *Asahi* is the current law); *Bond v. Octagon Process, Inc.*, 745 F. Supp. 710, 713 (M.D. Ga. 1990) (same), *cert. denied*, 501 U.S. 1232 (1991). Others have adopted Justice Brennan’s approach. *See Renner v. Lanard Toys Ltd.*, 33 F.3d 277, 280-82 (3d Cir. 1994) (discussing prior decisions with rationales substantially similar to Justice

E. Stream of Commerce in the Eighth Circuit After Asahi

Since *Asahi*, the stream of commerce theory in the Eighth Circuit has traveled an inconsistent but seemingly deliberate path. Initially embracing O'Connor's "additional conduct" approach, the circuit continually has backed away from its original position and has moved toward Brennan's broader interpretation of the stream of commerce theory of personal jurisdiction.

Roughly one year after *Asahi*, the Eighth Circuit rendered its first interpretation of the decision in *Falkirk Mining Co. v. Japan Steel Works, Ltd.*¹⁰⁸ The plaintiff mining company sued a Japanese manufacturer in North Dakota for producing a defective part in a walking dragline crane¹⁰⁹ purchased by the plaintiff.¹¹⁰ The defendant had sold the component part, F.O.B. Japanese port,¹¹¹ to a dragline manufacturer in Ohio.¹¹² The manufacturer subsequently incorporated the part into one of its own draglines and sold it to the plaintiff in North Dakota.¹¹³ While the defendant and the Ohio manufacturer had several contacts with each other,¹¹⁴ the defendant had no related contacts with the forum other than the fact that its product ended up in the state through the chain of distribution.¹¹⁵

Brennan's approach); *Ruston Gas Turbines, Inc. v. Donaldson Co.*, 9 F.3d 415, 420 (5th Cir. 1993). Still, other courts have ignored the *Asahi* decision and still look to *World-Wide Volkswagen* for guidance. See *Irving v. Owens-Corning Fiberglass Corp.*, 864 F.2d 383, 386 (5th Cir. 1989) ("Because the Court's splintered view of minimum contacts in *Asahi* provides no clear guidance on this issue, we continue to gauge . . . contacts . . . by the stream of commerce standard as described in *World-Wide Volkswagen* . . ."), *cert. denied sub nom. Jugometal Enter. For Imp. & Exp. of Ores & Metals v. Irving*, 493 U.S. 823 (1989).

108. 906 F.2d 369 (8th Cir. 1990).

109. A walking dragline crane is an "enormous piece of machinery" used in mining operations, weighing about "13.5 million pounds and stand[ing more than] 17 stories high." *Id.* at 371 n.1.

110. See *id.* at 371-72. The defendant's component part had cracked, causing approximately five-hundred-thousand dollars in damage to the plaintiff. *Id.* at 372.

111. For the definition of F.O.B., see *supra* note 12.

112. *Falkirk*, 906 F.2d at 372.

113. *Id.* at 371-72.

114. At the Ohio manufacturer's request, the defendant designed its component parts specifically for the dragline purchased by the plaintiff. See *id.* at 371. Additionally, the Ohio manufacturer provided the design for the part, and it sent officials to Japan to monitor the defendant's construction of the part. See *id.*

115. See *id.* at 375. The defendant had no office, agents, employees, or property in North Dakota. See *id.* Furthermore, the company did not advertise or otherwise solicit business in the state. See *id.* The defendant neither had a contractual relationship with the forum company, nor did the company create, control, or employ the distribution

The Eighth Circuit held that subjecting the defendant in *Falkirk* to personal jurisdiction was unconstitutional because the defendant lacked sufficient minimum contacts with the forum.¹¹⁶ In reaching this conclusion, the court noted the similarity between the facts of *Falkirk* and those in *Asahi*, and adopted O'Connor's "additional conduct" test to resolve the issue.¹¹⁷ The court concluded that, "[l]ike the nonresident defendant in *Asahi*, [the defendant's] placement of a product into the stream of commerce, without more does not constitute an act of the defendant purposefully directed towards the forum State."¹¹⁸

The Eighth Circuit reaffirmed its *Falkirk* "additional conduct" test two years later in *Gould v. P.T. Krakatau Steel*.¹¹⁹ The defendant in *Gould* was an Indonesian steel manufacturer that advertised in a worldwide publication.¹²⁰ The defendant had contracted to sell fourteen-thousand metric tons of its products to a nationwide distributor located in New York and had sent its agents to the United States to meet with representatives from the New York distributor during negotiations for this contract.¹²¹ The defendant delivered the products F.O.B. Indonesia.¹²² The distributor subsequently sold some of the products to an Arkansas company, and one of that company's employees suffered permanent injury while unpacking these products.¹²³ The employee then brought a products liability action in Arkansas against the defendant.¹²⁴

On the issue of personal jurisdiction, the plaintiff argued that because the defendant advertised in a worldwide publication, sent agents to the United States, and continually sold products to the United States, personal jurisdiction was proper vis-à-vis the defendant.¹²⁵ The Eighth Circuit disagreed. While the court recognized that "Arkansas has an [sic] strong interest in providing a forum for an injured resident," the court held that, because the defendant was not licensed to do business in the state, had no direct marketing presence there, and did not specifically design its products for Arkansas, there were insufficient contacts to establish personal jurisdiction.¹²⁶ The court further held that the defendant's placement of its products into the stream of commerce was "not an

system that brought its product to North Dakota. *See id.*

116. *See id.*

117. *See id.*

118. *Id.* at 376.

119. 957 F.2d 573 (8th Cir.), *cert. denied*, 506 U.S. 908 (1992).

120. *See id.* at 574.

121. *See id.* at 574-75.

122. *See id.* at 575. For an explanation of the term F.O.B., see *supra* note 12.

123. *See Gould*, 957 F.2d at 575.

124. *See id.*

125. *See id.* at 576.

126. *Id.*

act ‘purposefully directed’ toward the state” and that “the fact that the [defendant] could foresee that its product might find its way to Arkansas [was] too attenuated to constitute purposeful availment of Arkansas’ laws and protections.”¹²⁷

Two years after *Gould*, however, the Eighth Circuit had an apparent change of heart regarding its stream of commerce theory in *Barone v. Rich Bros. Interstate Display Fireworks Co.*¹²⁸ The plaintiff sued the defendant, a Japanese fireworks manufacturer, in Nebraska after a fireworks display that he was working on went awry.¹²⁹ The Japanese defendant sold the fireworks to one of its nine distributors in South Dakota, which, in turn, sold them in Nebraska.¹³⁰ The defendant’s nine distributors purchased, on average, \$640,000 worth of fireworks annually, which constituted, on average, slightly more than seventy percent of the defendant’s business.¹³¹ Sixteen percent of these purchases were eventually resold in Nebraska.¹³²

The defendant, however, had no direct contacts with Nebraska. It had “no office in Nebraska, no agent for service of process, [and] no distributor.”¹³³ In addition, the defendant did not advertise in the state or send any of its products into Nebraska.¹³⁴

Nevertheless, the Eighth Circuit held that the defendant had sufficient minimum contacts with the forum state to allow for personal jurisdiction.¹³⁵ The court noted that the defendant strategically had selected its distributors “in an effort to reach much of the country through a limited number of regional distributors.”¹³⁶ The court, thus, concluded that, when a foreign manufacturer “pour[s] its products” into a regional distributor with the expectation that the distributor will penetrate a discrete, multi-state trade area, the manufacturer has “purposefully reaped the benefits” of the laws of each state in that trade area for due process purposes.¹³⁷

127. *Id.*

128. 25 F.3d 610 (8th Cir.), *cert. denied sub nom.* Hosoya Fireworks Co. v. Barone, 513 U.S. 948 (1994).

129. *See id.* at 610-11.

130. *Id.* The defendant’s other distributors were located in California, Indiana, Missouri, Ohio, and Pennsylvania. *Id.* at 611.

131. *Id.* The defendant’s South Dakota distributor purchased, on average, slightly more than \$100,000 worth of fireworks annually. *Id.*

132. *Id.*

133. *See id.*

134. *See id.*

135. *See id.* at 615.

136. *See id.* at 613.

137. *See id.* at 615.

In reaching this conclusion, the court attempted to reconcile this result with *Asahi* and the court's prior decision in *Falkirk*. Taking a different view than it did in *Falkirk*, the court held that O'Connor's opinion in *Asahi* did not govern the minimum contacts test in the Eighth Circuit.¹³⁸ The court instead held that *Asahi* failed to set new precedent because it lacked a majority opinion as to the minimum contacts test for the stream of commerce theory.¹³⁹ Ultimately, the court held that the pre-*Asahi* language of *World-Wide Volkswagen* controlled the issue "that[,] when a manufacturer or distributor attempts to serve a market 'directly or indirectly . . . , it is not unreasonable to subject it to suit in [that market] if its allegedly defective merchandise has been the source of injury to its owner or to others.'"¹⁴⁰

The court next attempted to reconcile its holding with its prior decision in *Falkirk*.¹⁴¹ The court distinguished *Falkirk*, holding that:

[in *Falkirk*,] a single component part manufactured by the defendant was incorporated by a third party into a piece of equipment sold to the plaintiff in the forum state. No evidence was presented indicating that the defendant either knew or should have known its component part would end up in the forum state, nor was there evidence that the defendant had availed itself in any way of the benefits of the laws of the forum state.¹⁴²

As a result, the court concluded that, unlike in the present case, the contacts in *Falkirk* were "attenuated, random, [and] fortuitous" and, therefore, distinguishable from the court's present holding.¹⁴³

138. See *id.* at 614. The court said, "[i]n short, *Asahi* stands for no more than that it is unreasonable to adjudicate third-party litigation between two foreign companies in this country absent consent by the nonresident defendant." *Id.*; see also *Vandelune v. 4B Elevator Components*, 148 F.3d 943, 948 (8th Cir.) (holding that the minimum contacts debate in *Asahi* "remains an open question"), *cert. denied sub nom. Synatel Instrumentation Ltd. v. Vandelune*, 525 U.S. 1018 (1998).

139. See *Barone*, 25 F.3d at 614. The court did note, however, that: [s]hould one engage in vote counting, which we are loath to do, it appears that five justices agreed that continuous placement of a significant number of products into the stream of commerce with knowledge that the product would be distributed into the forum state represents sufficient minimum contacts to satisfy due process.

Id.

140. *Id.* (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

141. See *id.* at 615.

142. *Id.*

143. *Id.*

Reaffirming its holding in *Barone*, the Eighth Circuit again held the exercise of jurisdiction proper over a foreign manufacturer in *Vandelune v. 4B Elevator Components*.¹⁴⁴ The defendant in the case was an English manufacturer that had sold a grain elevator safety switch to an English distributor.¹⁴⁵ The English distributor subsequently sold the product to an Illinois distributor.¹⁴⁶ The Illinois distributor then sold the product to an Iowa business, which ultimately installed the safety switch into the plaintiff's grain elevator.¹⁴⁷ The plaintiff sued the defendant in an Iowa court for products liability after his grain elevator exploded, causing him severe injuries.¹⁴⁸

Like the defendants in *Barone*, *Falkirk*, *Gould*, and *Asahi*, the defendant had no direct marketing presence in the forum state.¹⁴⁹ But the court noted that: (1) the defendant, while it had not sold directly to the Illinois distributor, had agreed to distribute the product through the Illinois company; (2) the defendant put its logo on its product; (3) the defendant shipped its product directly to the Illinois distributor, which was about eighty miles from the Iowa border; (4) the defendant's employees attended technical support meetings at the Iowa distributor's facility; (5) the defendant designed its product for the United States market; and (6) eighty-one of the 619 safety switches that the defendant sold in the United States were resold in Iowa.¹⁵⁰ On these facts, the court held that the defendant had "pour[ed] its products' into a regional distributor with the expectation that the distributor will penetrate a discrete, multi-State trade area."¹⁵¹ The court, therefore, concluded that the defendant had "purposefully reaped the benefits' of the laws of each State in that trade area for due process purposes."¹⁵²

After *Vandelune* and *Barone*, the court clearly had established, contrary to O'Connor's opinion in *Asahi* and contrary to its own decision in *Falkirk*, that a foreign manufacturer may be subject to personal jurisdiction in a state without a direct marketing presence in that forum.¹⁵³ According to the court, however, *Falkirk* was still good law, thereby precluding the court from adopting Brennan's interpretation that a defendant's mere awareness that a product may reach the forum state through the chain of distribution is a sufficient contact to establish

144. 148 F.3d 943 (8th Cir.), cert. denied sub nom. Synatel Instrumentation Ltd. v. Vandelune, 525 U.S. 1018 (1998).

145. *Id.* at 945.

146. *Id.*

147. *See id.*

148. *See id.*

149. *See id.* at 948.

150. *See id.*

151. *Id.*

152. *Id.*

153. *See supra* notes 128-48 and accompanying text.

jurisdiction. *Vandelune* and *Barone* apparently attempted to achieve a middle ground between O'Connor and Brennan, holding a nonresident manufacturer with no direct marketing presence in the forum amenable to suit in that forum only if that manufacturer attempted to penetrate a discrete multi-state area through regional distributors. Nevertheless, in its next decision on the issue in *Clune*, the Eighth Circuit broadened its interpretation of the stream of commerce theory even further and all but embraced Brennan's stream of commerce theory.

IV. INSTANT DECISION

A. The Majority

In *Clune*, the Eighth Circuit found that a foreign manufacturer with no marketing presence in the forum state purposefully avails itself of the forum's laws when it sells its product to a distributor that has sales territories throughout the United States.¹⁵⁴

In reaching this conclusion, the court applied its holdings in *Barone* and *Vandelune*, and found that Alimak AB had significant contacts with Missouri for the following reasons: (1) Alimak AB designed its construction hoists for United States markets where it had exclusive agreements with United States distributors; (2) its logo appeared on its products; (3) Alimak AB conducted training seminars in the United States for technicians employed by its United States distributor; (4) the company provided sales brochures and instruction manuals to its distributors for use in promoting its products; and (5) of the seven hundred construction hoists that Alimak AB sold in the United States, twenty to forty of them ended up in Missouri.¹⁵⁵ The court held that while "[a]ny of these facts, taken alone, might fall short of purposeful availment, . . . when taken together they show that [Alimak AB] engaged in a series of activities that were designed to generate profits to the [company] from . . . sales across the United States."¹⁵⁶

The court next addressed the district court's ruling that Alimak AB should not be subject to jurisdiction in Missouri because it sent its product to a national distributor, rather than to "a regional distributor with the expectation that the distributor [would] penetrate a discrete, multi-State trade area."¹⁵⁷ The court quickly dismissed this distinction, holding that "[a multi-state] foreign manufacturer that successfully employs a number of regional distributors to

154. *Clune v. Alimak AB*, 233 F.3d 538, 544 (8th Cir. 2000), *cert. denied*, 121 S. Ct. 2551 (2001).

155. *See id.* at 543.

156. *Id.* at 544.

157. *Id.*

cover the United States intends to reap the benefits of sales in every state where the distributors market.”¹⁵⁸ The court concluded that the “difference is one of form, not function, and the practical effect is the same.”¹⁵⁹

Finally, the court addressed its earlier decisions in *Falkirk* and *Gould*, holding that the cases were distinguishable from its present holding.¹⁶⁰ The court held that the present case was distinguishable because there was evidence of continuous transactions between Alimak AB and its United States distributors.¹⁶¹ The court also noted that, unlike the defendant in *Clune*, the defendant in *Falkirk* never visited the United States nor was there any evidence that the defendant knew or should have known that its product would end up in the forum State.¹⁶² The court finally noted that the litigation in its earlier decisions involved commercial disputes, “which [are] distinct from the Clune’s personal injury claim against [Alimak AB].”¹⁶³ The court, therefore, held that the granting of jurisdiction in this case would not be inconsistent with its earlier decisions.¹⁶⁴

Based on these reasons, the court held that Alimak AB “purposefully directed its products to the United States through the distribution system it set up in this country.”¹⁶⁵ The court thus held that the “company knew that[,] by virtue of this system, its construction hoists entered the Missouri and other Midwest markets.”¹⁶⁶ Therefore, the court concluded that Alimak AB’s “creation of the system that brought hoists to Missouri established sufficient minimum contacts with that forum to satisfy the due process standards set by the Supreme Court and followed by this circuit.”¹⁶⁷

B. The Concurrence

Judge Bright concurred in the result only, holding, “I do not agree with the stream of commerce theory of the majority.”¹⁶⁸ He made note of the fact that the Swedish company shipped the construction hoist F.O.B. Swedish port to a distributor located in the Pacific Northwest of the United States.¹⁶⁹ Judge Bright

158. *Id.*

159. *Id.*

160. *Id.* at 545 n.9.

161. *Id.*

162. *Id.*

163. *Id.*

164. *See id.*

165. *Id.* at 544.

166. *Id.*

167. *Id.*

168. *Id.* at 546 (Bright, J., concurring). For a discussion on Judge Bright’s rationale for extending personal jurisdiction, see *supra* note 31.

169. *Clune*, 233 F.3d at 546 (Bright, J., concurring).

concluded that the majority's "application of the stream of commerce theory would subject a foreign entity to suit in any state of the Union where the product ended up, regardless of the original destination for the article or how the particular product happened to be in a particular place in any state."¹⁷⁰

V. COMMENT

The Eighth Circuit significantly departed from its *Falkirk* and *Gould* decisions regarding the stream of commerce theory, and its *Clune* decision, in effect, has limited those decisions to their specific facts. The problem with the opinion, however, stems not from the court's change of heart but from the court's logic in its attempt to distinguish the cases. As a consequence, the court has achieved a proper result through inconsistent reasoning.

A. The Inconsistent Reasoning

The court in *Clune*, by holding that a foreign manufacturer with no direct marketing presence in the forum state is subject to personal jurisdiction when its products end up in that state through a national distributor, in effect, has overruled its prior holdings in *Falkirk* and *Gould*. In reaching this holding, however, the court inadequately distinguished the case from its prior holdings.

The similarities among *Clune*, *Falkirk*, and *Gould* are striking. All three cases involved foreign manufacturers whose products ended up in the forum state through a nationwide distributor.¹⁷¹ None of the defendants in the cases had offices, agents, property, bank accounts, or operations in the forum states.¹⁷² The manufacturers did not advertise or solicit business directly from the states.¹⁷³ Furthermore, none of the manufacturers were licensed to do business in the forums.¹⁷⁴ Finally, all of the manufacturers shipped their products F.O.B. from their respective countries.¹⁷⁵

The court, however, made several distinctions among the cases. First, the court made note of the fact that, in the present case, the manufacturer had an ongoing relationship with its distributor, while the other cases involved limited transactions.¹⁷⁶ However, in light of the *Falkirk* case, this reasoning is

170. *Id.* (Bright, J., concurring).

171. *See supra* notes 107-53 and accompanying text.

172. *See supra* notes 107-53 and accompanying text.

173. *See supra* notes 107-53 and accompanying text.

174. *See supra* notes 107-53 and accompanying text.

175. *See supra* notes 107-53 and accompanying text.

176. *See Clune v. Alimak AB*, 233 F.3d 538, 545 n.9 (8th Cir. 2000), *cert. denied*, 121 S. Ct. 2551 (2001).

unpersuasive. *Falkirk* involved a major project for a 13.5-million ton piece of machinery.¹⁷⁷ In fact, the Ohio distributors visited Japan on three separate occasions to monitor the manufacture of the parts.¹⁷⁸ Because of the significant interaction between the manufacturer and the distributor, the court incorrectly classified this transaction as limited.

The court also attempted to distinguish *Clune* from *Falkirk* and *Gould* by the fact that the latter cases “involved a commercial dispute between merchants, which is distinct from *Clune*’s personal injury claim against” Alimak AB.¹⁷⁹ This distinction, however, also lacks merit as the court misstated the facts. *Gould* was a products liability action for a personal injury that an Arkansas employee sustained while unloading the defendant’s products.¹⁸⁰ It hardly can be said to involve merely a commercial dispute. Therefore, the court’s distinction fails here, as well.

Finally, the court attempted to distinguish *Clune* by the fact that, unlike the defendant in *Falkirk*, the defendant in *Clune*, “at a minimum, had constructive knowledge that its construction hoists would end up in Missouri.”¹⁸¹ However, in its prior cases, the court held that the mere awareness that a product would end up in a forum was not a dispositive factor in extending personal jurisdiction.¹⁸² In *Gould*, the court held that, “[s]tanding alone, the fact that [a defendant] could foresee that its product might find its way to [a state] is too attenuated to constitute purposeful availment of [that state’s] laws and protections.”¹⁸³ Therefore, the court’s attempt to distinguish the cases on Alimak AB’s constructive knowledge that its products would end up in Missouri is unpersuasive.

In sum, the Eighth Circuit has not distinguished its holding in *Clune* from its earlier decisions in *Falkirk* and *Gould* satisfactorily. Thus, the court effectively has overruled its prior decisions and fully embraced Brennan’s liberal stream of commerce theory. But, even though the court used some inconsistent logic and fact application to get there, it has switched to the better view.

177. See generally *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369 (8th Cir. 1990).

178. See *id.* at 375.

179. *Clune*, 233 F.3d at 538.

180. See *Gould v. P.T. Krakatau Steel*, 957 F.2d 573, 575 (8th Cir. 1992).

181. See *Clune*, 233 F.3d at 545 n.9.

182. See *Gould*, 957 F.2d at 576.

183. *Id.*

B. The Right Result

In determining which stream of commerce theory is preferable (O'Connor's view or Brennan's view), it is important to understand the competing policy concerns. On the one hand, there is the concern of promoting predictability in the legal system. As Justice White stated in *World-Wide Volkswagen*, requiring a more direct connection between a defendant and a forum state "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."¹⁸⁴ He admonished that making foreseeability the criterion for minimum contacts, in effect, turns a seller's chattels into roving agents for service of process, subjecting a seller to suit in all fifty states.¹⁸⁵

Against this interest, however, the strong interests of the forum state and resident plaintiff must be weighed. The state has "a strong interest in providing an effective means of redress for its injured resident who would find it impractical to sue in the defendant's jurisdiction."¹⁸⁶ The resident plaintiff also has a "strong interest in avoiding the expense, inconvenience, and potential bias of the foreign defendant's jurisdiction," which "generally offer plaintiffs fewer chances of recovery."¹⁸⁷

After balancing the interests, it is preferable to pick the policies favoring the forum state and plaintiff.¹⁸⁸ After all, it is the manufacturer that voluntarily places its product into the stream of commerce, while it is the plaintiff who involuntarily suffers injury. Furthermore, by prohibiting indirect contacts as a sufficient basis for extending personal jurisdiction, a manufacturer could insulate itself from lawsuits "by selling its products F.O.B. at a single location, by using a single 'independent' distributor to distribute its products nationwide, or by using

184. *World-Wide Volkswagen Co. v. Woodson*, 444 U.S. 286, 297 (1980).

185. *See id.* at 296; *see also Clune*, 233 F.3d at 546 (Bright, J., concurring).

186. *Erik T. Moe, Asahi Metal Industry Co. v. Superior Court: The Stream of Commerce Doctrine, Barely Alive But Still Kicking*, 76 GEO. L.J. 203, 220 (1987); *see also Gould*, 957 F.2d at 576 (recognizing that states have a "strong interest in providing a forum for an injured resident to bring a products liability action against a nonresident defendant").

187. *See Moe, supra* note 186, at 220-21.

188. *See Barone v. Rich Bros. Interstate Fireworks Co.*, 25 F.3d 610, 615 (8th Cir.) (holding that "it is only reasonable for companies that allegedly distribute defective products through . . . distributors in this country to anticipate being haled into courts by plaintiffs in their home states"), *cert. denied sub nom. Hosoya Fireworks Co. v. Barone*, 513 U.S. 948 (1994).

brokers who theoretically are 'responsible' for any direct contacts with a particular forum."¹⁸⁹

Applying the liberal stream of commerce theory in *Clune*, the Eighth Circuit reached the right result. Twenty to forty of Alimak AB's hoists ended up in Missouri; therefore, subjecting Alimak AB to suit in the forum was not an unforeseeable consequence of its actions.¹⁹⁰ Furthermore, the liberal theory helps ensure the widowed family of Mr. Clune will recover for its loss by saving the family the expense and possible bias of bringing a suit in distant Oregon, or, even worse, Sweden.

VI. CONCLUSION

Since its inception, the stream of commerce theory of personal jurisdiction has created conflict among courts. The dividing line has been whether a foreign manufacturer that merely places its product into the stream of commerce can be amenable to suit in a forum state absent a direct marketing presence in the forum. The Supreme Court has offered little guidance to the lower courts, as it was unable to obtain a majority on the issue in the landmark case of *Asahi*. In the wake of *Asahi*, the Eighth Circuit recently has taken an inconsistent path in liberalizing its stream of commerce theory. However, though the path is inconsistent, the result is equitable, and the Eighth Circuit has helped ensure that Eighth Circuit plaintiffs will get their day in court.

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189. Kim Dayton, *Personal Jurisdiction and the Stream of Commerce*, 7 REV. LITIG. 239, 271 (1988). Note that, in *Clune*, the manufacturer did just this. It shipped its product F.O.B. Swedish port to its sole distributor with which it had a very close relationship (including a common name). See *Clune*, 233 F.3d at 540. One only can wonder whether Alimak AB had such surreptitious motives in its actions.

190. See *id.* at 543-44.